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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 586

LOUIS J. O'MALLEY,
Defendant, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

JOSEPH MOFFIE *et al.*,
Defendants, Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WILLIAM SHAW McCALLUM,
68 Devonshire Street,
Boston 9, Massachusetts,
Counsel for Louis J. O'Malley, Appellant.

EDWARD E. COHEN,
113 State Street,
Boston 9, Massachusetts,
Counsel for Appellants, Joseph Moffie and Millard Moffie.

LAWYERS' BRIEF & PUBLISHING CO.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on November 23, 1955.

Citation to Opinion Below

The opinion of the Court of Appeals for the First Circuit, printed as Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

Whether the reversal of a criminal conviction should be granted by reason of the attorney for the Government in his argument to the jury making statements which were grossly improper and prejudicial to the defendants.

Whether the reversal of a criminal conviction should be granted by reason of the trial judge permitting the attorney for the Government in his argument to the jury to make statements which were grossly improper and prejudicial to the defendants.

Whether the reversal of a criminal conviction should be granted because the trial judge erred in allowing the prosecuting attorney to make inflammatory remarks without immediately correcting them, or instructing the jury in his charge to disregard them.

Constitutional Provision Involved

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment (Rights of Citizens) Constitution of the United States, Section 1.

Statement of the Case

On January 12, 1954, the Grand Jury returned an indictment against the three defendants containing four counts.

Count I charged that Louis J. O'Malley, Joseph Moffie and Millard Moffie, during the period between on or about March 10, 1950 and on or about March 1, 1952 at Hingham and Boston did wilfully, knowingly and unlawfully conspire to embezzle, steal and without authority to sell, convey and dispose of things of value of the Department of the Navy, to wit: electric cable, furniture, iron boxes and other personal property and fixtures located at the Naval Industrial Reserve Shipyard at Hingham, Massachusetts, of a total value in excess of one hundred dollars. Thereafter were listed thirteen overt acts.

Count II charged Louis J. O'Malley with selling knowingly and without authority one 2-ton Manual Chain Hoist, the cost price of which exceeded one hundred dollars.

Count III charged that Joseph Moffie knowingly and without authority sold one metal steam kettle whose cost price was in excess of one hundred dollars.

Count IV alleged that Millard Moffie stole and knowingly converted and caused to be stolen and knowingly converted lengths of electric cable the total cost price of which was in excess of one hundred dollars.

The defendants were found guilty by a jury on December 8, 1954, and on January 4, 1955 the defendant O'Malley was sentenced to a year and a day on each count to run concurrently. The defendant Joseph Moffie was sentenced to four months and Millard Moffie to three months on each count to run concurrently.

The Trial Judge Permitted the Attorney for the Government in His Argument to the Jury to Make Statements Which Were Grossly Improper and Prejudicial to the Defendants.

THE PARTS OF THE CLOSING ARGUMENT BY CHARLES F. CHOATE, ESQ., ASSISTANT UNITED STATES ATTORNEY, WHICH THE DEFENDANTS URGE WERE GROSSLY IMPROPER AND PREJUDICIAL:

"May it please the Court, Gentlemen of the Jury:

We have been here—this is the eighth day, and there has been enough evidence put in that I don't believe even if you were twelve Albert Einsteins you could remember all of it. You are not permitted to take notes, and there are many things that without refreshing my recollection from the notes I would forget. I am going to attempt in my argument to go through the evidence chronologically, not as it came in because some of it was not in chronological order as it was presented to you, but I am going to rearrange it in my argument and give you the essence.

I would like to say as a preliminary matter that if you think we get any fun or kick out of prosecuting a criminal case you are wrong. There is a great principle in the law, and that is equality before the law; and in dealing with this case in the jury room I am going to ask that you not be impressed by the big business aspects of it and the fact a figure of a hundred thousand dollars is mentioned or the figure of $15,000 or $20,000. I AM GOING TO ASK THAT YOU CONSIDER THE DEFENDANTS IN THE SAME LIGHT YOU WOULD CONSIDER, LET US SAY, A 20-YEAR OLD DOPE ADDICT OR A THIEF OR SOMETHING OF THAT SORT—MEN WHO DON'T

HAVE SAM SEARS OR GEORGE GARRITY TO COME IN SPEAKING FOR THEM. (Emphasis added.)

• • •

"Gentlemen, the last thing I am going to say to you, and I am almost finished, is the general significance of what took place down there. This involved a large sum of money. I think the total amount received from the sale of these articles came to approximately $45,000, somewhere in that vicinity. But, gentlemen of the jury, it isn't only the money and the value of this stuff that is significant. I want you to have in mind the time at which this occurred. The Korean War started in June of 1950, and these transactions went on both before and after that time. Nobody knew at that time whether we were going to be in a full scale war within a year or not. It was very possible. Many people thought it was probable. No one could know what the situation was at that time. And as Mr. Cohen asked you to take yourselves back to that time, I will ask you to take yourselves back to that time. If we had gone into a full scale war that yard would have been needed to make boats. The purpose of the lease was to keep the yard in a certain state of maintenance so it could be reactivated in a hurry. THESE MEN WHO ARE CHARGED HERE WITH GETTING TOGETHER WITH A CONSPIRACY TO REMOVE THIS PROPERTY DID A MORE EFFECTIVE JOB OF SABOTAGE ON THAT YARD THAN COULD HAVE BEEN DONE BY ANY COMMUNIST BOMB OR SABOTEUR. (Emphasis added.) Why, if that yard had been needed, and the important thing in that yard was the piers and the ways—that's what the whole yard was for, was to build and construct and equip boats at those piers and ways. With all the heavy cable removed from those piers and

ways it would all have to be replaced, and you can imagine the cost. But not so much the cost. If that yard had been needed in a hurry, in the condition it was when they went in there it would have been relatively easy to purchase the light electric lines and install those, plug them in; but it probably or might have, under the circumstances which it was possible could exist, would have taken months to supply that heavy electric cable, to have it made to specifications and installed. (Emphasis added.)"

Reasons for Granting the Writ

This case involves an important question, viz., that the acts of unfairness on the part of the Government attorney fatally infected the trial and that the acts of/by him complained of were of such quality as necessarily prevented a fair trial; and that the actions of the Government attorney and the trial court were not consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

At the beginning of his argument to the jury it will be noted the prosecuting attorney used this language:

> "I AM GOING TO ASK THAT YOU CONSIDER THE DEFENDANTS IN THE SAME LIGHT YOU WOULD CONSIDER, LET US SAY, A 20-YEAR OLD DOPE ADDICT, OR A THIEF, OR SOMETHING OF THAT SORT—MEN WHO DON'T HAVE SAM SEARS OR GEORGE GARRITY TO COME IN SPEAKING FOR THEM."

By "Sam" Sears the prosecuting attorney meant Samuel P. Sears, Esquire, of Boston, who has held high office in the legal fraternity, recently President of the Massachusetts Bar Association, a prominent trial attorney; and by "George" Garrity, the prosecuting attorney meant

George F. Garrity, Esquire, an equally prominent Massachusetts attorney, and the immediate predecessor in office of the present United States Attorney for Massachusetts. Both these gentlemen testified as to the defendant O'Malley's standing at the bar as a reputable attorney, and as an outstanding citizen.

Again, near the end of his argument the prosecuting attorney used this language:

> "IF WE HAD GONE INTO A FULL SCALE WAR THAT YARD WOULD HAVE BEEN NEEDED TO MAKE BOATS. THE PURPOSE OF THE LEASE WAS TO KEEP THE YARD IN A CERTAIN STATE OF MAINTENANCE SO IT COULD BE REACTIVATED IN A HURRY. THESE MEN WHO ARE CHARGED HERE WITH GETTING TOGETHER WITH A CONSPIRACY TO REMOVE THIS PROPERTY DID A MORE EFFECTIVE JOB OF SABOTAGE ON THAT YARD THAN COULD HAVE BEEN DONE BY ANY COMMUNIST BOMB OR SABOTEUR."

There was no evidence that the yard would be needed to make boats. There was no evidence of the purpose of the Navy in making the lease. The lease stated that the yard was not surplus to the needs of the Navy, but for the time being was not required for public use, and that it would be in the public interest to lease it. There was no evidence that it was to be kept in such state of maintenance so as to be reactivated in a hurry. There was no evidence that anything done by the defendants was in the nature of communistic sabotage or bomb damage.

The jury composed entirely of men, and it is fair to assume it was the first time some of them had been called

for duty and selected as jurors to try a case involving alleged offenses against the United States. It is submitted as a truism the proposition that the effect upon a juror when called for service in a United States Court is vastly different than when called to perform the same duty in a State Court. Because—rightfully or wrongfully—when called to perform a service for the sovereign power of his nation as a whole he is bound to be impressed with his greater responsibility. While he may respect and honor a judge of a State Court, while sitting as a juror when he serves in a United States District Court—for some reason which is unexplainable—he not only respects the judge, but holds him in awe. The slightest word, the intonation of the voice, the movement of the head, the hands, or a look in the eyes, he tries to interpret as a clue intended for him only as to what the judge has in mind.

Almost in the same category as the judge is the United States Attorney or his assistants. They are an arm of the Court. They represent the sovereign power. This being so the thought follows in the minds of the jury, as night does day, that the prosecuting attorney can do no wrong, can commit no error, and that every word falling from his lips (especially in condemnation of the accused) must be accepted as true and followed in weighing the evidence as to his guilt or innocence.

The trial of these cases began November 29, 1954. During the period February 8, 1954 up to the date of the trial of these defendants and during their trial newspapers throughout Massachusetts were carrying headlines of the indictment in Middlesex County (a neighboring County to Boston) for alleged communistic activities of Dirk Stuick and George Wenner, both members of the teaching staff of

Harvard, our nationally known educational institution of higher learning.

Wide publicity was also being given in the daily and Sunday papers throughout Massachusetts of the release from prison of Alger Hiss with a description of the offense of which he had been convicted and for which he had served a prison sentence; also there were articles of the preliminary steps being taken to bring to trial in Massachusetts one Furry and one Kamin for their alleged communistic activities, as well as accounts of the investigation of the Cabot Commission (created by the Massachusetts Legislature) into non-American activities and of not only the names of witnesses appearing before it, but, in addition, a resume of their testimony.

During the same period the newspapers in Massachusetts were carrying articles of the investigation being conducted by the so-called Bowker Commission in Boston (also created by the Massachusetts Legislature), names of witnesses summoned to testify and excerpts of the statements made by them; and in April and May, 1954 there were large headlines and lengthy articles in the Boston papers with respect to the indictment by a Suffolk County Grand Jury of: Daniel Boone Schirmer, Ann Burlack Timpson, Barbara Bennett Rosenkrantz, Herbert Zimmerman, Edith Ober, Otis Archer Hood, and Franklin P. Collier, Jr., for alleged communistic activities.

It is respectfully urged upon this Court that not only the trial judge but the prosecuting attorney as well, in his role as a quasi-judicial official, had the positive obligation and duty to see that the trial of any given cause under these circumstances and conditions was conducted fairly. This obligation neither the trial Judge nor the prosecuting attorney fulfilled.

And as to the 12 men composing the jury who were sworn to decide the case and reach a decision as to the guilt or innocence of the accused only upon the testimony submitted to them.

Does it sound unbelievable to this Court when it is urged that there is not a man, woman or child in New England above the age of 15 who does not read every day one or two papers published in their city, and at least one on Sunday—and it is further urged that this must have been the case with respect to every one of the men who made up this jury.

It is submitted, and this tribunal is besought to find, that any species of forensic activity indulged in by the prosecuting attorney with the intent to divert the jury from its determination of the innocence or the guilt of the defendants by weighing the evidence legally admitted and presented to them in the manner prescribed by law, is abhorrent to the letter and the spirit of the Constitution and prejudicial.

In the trial of these defendants the prosecuting attorney appealed to the jurors' prejudices, fears and notions of popular sentiment in his argument to them—urging them to make inferences not based on evidence submitted during the course of the trial, and to disregard any favorable evidence to the defendants altogether and to base their determination and findings on wholly and entirely upon irrelevant factors.

It is submitted that the crudest appeal made by the prosecuting attorney to the jury in the trial of these three defendants was that in which he inferentially urged them to ignore completely certain portions of the evidence favorable to them and to convict them entirely upon matters external to the trial and thereby (for them) to avoid pos-

sible public denunciation if their verdict was one of not guilty, and to win the possible plaudits of the community if it was one of guilty.

The seed of suspicion, prejudice, and almost hate, having been planted early in his argument, and reiterated near its closing by the prosecuting attorney, it was impossible to eradicate it, but we respectfully submit that the trial judge was derelict in his bounden duty in this respect, and that he did not try, but remained mute, and that thereby all of the defendants were unalterably prejudiced.

In this situation, and under these circumstances, and the crude appeal of the prosecuting attorney to the prejudices of the jury, it is urged that it became not only the positive, but the bounden duty of the trial judge not only to stop the prosecuting attorney in each instance when these statements were made, but also then and there to immediately caution the jury to confine their attention to the legitimate evidence which had been presented to them and to judge the case strictly on its merits. This bounden duty and obligation he failed to observe and perform to the prejudice of the defendants.

It is further urged, as to the trial judge, that it was not only his obligation but also his bounden duty in his instructions to the jury, to emphasize the fact that the prosecuting attorney's argument had not only been grossly improper, but also to point out to them in plain, unmistakable language, the particulars in which it was so, and to instruct them to cast aside in their deliberations the improper considerations that had been presented to them by him and in doing so make use of such clear and cogent language as would tend to correct the obviously harmful effect of his argument. This he failed to do to the prejudice of all the defendants.

It is further urged upon this Court that these statements in the argument of the prosecuting attorney were entirely improper and prejudicial in their nature. They were statements purporting to be on his personal knowledge (so far as the jury was concerned) or, at least, concerning which the inference might be drawn by them that he had such personal knowledge.

It is submitted that it is as much the duty of the prosecuting attorney to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

As to situations where the use of improper, and inflammatory argument by the prosecuting attorney were determined to be adequate ground for reversal, the following, in concise form, are cited:

> "Counsel for the Government in criminal prosecutions are free to make earnest and vigorous arguments to the jury, but are not privileged to transgress recognized canons of propriety by endeavoring to arise passion or prejudice."
>
> *Preitch v. U. S.*, 110 F. 2d 817.
>
> "But, oh, they can twist the questions . . . they can sit up in their offices and devise ways to pass counterfeit money 'but don't let the Government touch me, that is unfair, please leave my clients alone.' "

Conviction reversed. "The District Attorney may strike hard blows, but is not at liberty to strike foul ones."

Berger v. U. S., 295 U. S. 78.

Lehman v. U. S., 62 F. 2d 716, 718A.

In *Viereck v. U. S.*, 318 U. S., 236 the prosecuting attorney waived the spectre of war before the jury (much as was done by the prosecuting attorney in the present case) and the Court said:

"We direct attention to conduct of the prosecuting attorney which we think prejudiced the petitioner's right to a fair trial, and which, independently of the error for which we reverse, might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudices . . . we think the trial judge should have stopped counsel's discourse without waiting for an objection."

In *Clair v. State,* 40 Neb. 534, 59 NW 118, the word "inflammatory" is defined as being derived from inflame and meaning (1) To set fire, to kindle (2) To excite or increase, as passion or appetite, to enkindle into a violent passion (3) To exaggerate, aggravate (4) To heat, to excite excessive action in the blood vessels (5) To provoke, to irritate to anger (6) To increase, to exasperate (7) To increase, to argument, and as so defined the term inflammatory as applied to the charge was a merited criticism.

In *Olmstead v. U. S.,* 277 U. S., 438, the Court used this language:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for laws; it invites every man to become a law unto himself; it invites anarchy. To declare in criminal law that the end justifies the means—to declare that the government may indulge in unfair tac-

> tics in the trial of a cause, and, especially in argument to the jury in order to secure the conviction of a private criminal—would bring terrible retribution."

That no where in the charge to the jury made by the Court below was there any reference to the improper, prejudicial, and inflammatory remarks made to the jury in the closing argument of the Assistant United States Attorney; nor was any admonition given by the Court in its charge to the jury to disregard these improper, prejudicial and inflammatory remarks.

Conclusions

For the foregoing reasons, it is respectfully submitted that because of the remarks of the prosecuting attorney and the inflammatory language used was so prejudicial to the rights of the defendants that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

William Shaw McCallum,
68 Devonshire Street,
Boston 9, Massachusetts,
Counsel for Louis J. O'Malley, Appellant.

Edward E. Cohen,
113 State Street,
Boston 9, Massachusetts,
Counsel for Appellants, Joseph Moffie and Millard Moffie.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 4953.

LOUIS J. O'MALLEY,
Defendant, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 4954.

JOSEPH MOFFIE ET AL.,
Defendants, Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Wm. Shaw McCallum and *Vincent R. Brogna* for Louis J. O'Malley, appellant.

Edward E. Cohen for Joseph Moffie et al., appellants.

Daniel Needham, Jr., Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

November 23, 1955.

MAGRUDER, *Chief Judge.* The three appellants herein have taken appeals from judgments of conviction entered pursuant to jury verdicts after a trial on an indictment in four counts. The first count, based upon 18 U. S. C. § 371, charged the defendants with having engaged in an unlawful conspiracy during the period March 10, 1950, to March 1, 1952, to commit offenses against the United States denounced in 18 U. S. C. § 641, that is to say, "to knowingly and wilfully embezzle, steal, purloin and knowingly convert to their own use and to the use of others, and without authority, to sell, convey and dispose of things of value of the Department of the Navy of the United States," to wit: various items of personal property and fixtures located at the Naval Industrial Reserve Shipyard at Hingham, Massachusetts, of a total value in excess of $100.00. A number of overt acts in furtherance of the conspiracy were set forth in Count 1. In the second count, defendant O'Malley alone was charged with the commission of a substantive offense under 18 U. S. C. § 641 in that he "did, knowingly and wilfully and without authority, sell, convey and dispose of a thing of value of the Department of the Navy of the United States, to wit: One 2-Ton Manual Chain Hoist, the cost price of which to the Department of the Navy of the United States was in excess of One Hundred Dollars ($100.00)." Similarly, Count 3 charged that defendant Joseph Moffie alone committed an offense under 18 U. S. C. § 641 in knowingly and wilfully and without authority selling and disposing of a Metal Steam Kettle, the cost price of which to the Navy Department was in excess of $100.00. Count 4 charged the defendant Millard Moffie alone with an offense under 18 U. S. C. § 641 in that he did steal, purloin and knowingly convert to his own use

and to the use of others certain lengths of electric cable, the total cost price of which to the Navy Department was in excess of $100.00.

Since the jury reported verdicts of guilty on each of the four counts, each defendant now stands convicted on the conspiracy count, and on one additional count charging a substantive offense under 18 U. S. C. § 641. Concurrent sentences of imprisonment for a year and a day were imposed on the defendant O'Malley on Counts 1 and 2, respectively. Concurrent sentences of imprisonment for four months were imposed on defendant Joseph Moffie on Counts 1 and 3, respectively, and concurrent sentences of imprisonment for three months were imposed on defendant Millard Moffie on Counts 1 and 4, respectively. In view of the concurrent sentences, these appeals must necessarily fail if the conviction of each of the defendants may be sustained as to either of the counts on which a verdict of guilty was returned. See *Claassen* v. *United States*, 142 U. S. 140 (1891); *Sinclair* v. *United States*, 279 U. S. 263, 299 (1929); *Jarvis* v. *United States*, 90 F. 2d 243, 246-47 (C. A. 1st, 1937); *Giugni* v. *United States*, 127 F. 2d 786, 792 (C. A. 1st, 1942).

Early in 1950 Hingham Management Corporation took possession of the Naval Industrial Reserve Shipyard at Hingham, Mass., with the personal property therein, under a lease from the government, at a nominal rental, for a term of five years, with an option in the lessee of extension, upon notice, for two additional terms of five years each. The lease recited that the Secretary of the Navy had determined that the leased "Facilities" were "not surplus to the needs of the Department," but were "not, for the time being, required for public use." The lessee obligated itself to expend a maximum of $100,000 a year for protec-

tion, maintenance and repair of the facilities, as the Department might from time to time reasonably require and direct. The Lessee was permitted under the lease to use the facilities for warehousing and light industrial purposes only, plus such additional purposes as might first be authorized by the Department. However, the lessee in its use of the facilities was required, at its own expense, to take all reasonable precautions "to protect the Government-owned real and personal property from damage by reason of the Lessee's operations." The government as lessor was given a right of access to the facilities at all times in order to protect its interest in the shipyard and for any other purposes not inconsistent with the use of the facilities by the lessee as therein provided. Also, the government reserved the right to terminate the lease at any time prior to the expiration of the term thereof, during any national emergency declared by the President or Congress, or upon 90 days' written notice whenever the Secretary of the Navy should determine that the interests of national defense so required. It is apparent from the face of the lease that it served as a means whereby the Navy could assure itself of the maintenance of the shipyard ready for immediate use, at no cost to the government.

Defendant O'Malley was the president and principal officer of the lessee corportion. Defendant Joseph Moffie, with the title of traffic manager, acted as a general assistant to O'Malley. Joseph's son, the defendant Millard Moffie, was employed as a straw boss supervising the work of other corporate employees in the shipyard. There is no doubt that during the period from 1950 to 1952 the appellants stripped the shipyard of a great variety of items of personal property and of removable fixtures and disposed of the same, mostly to dealers in junk and scrap metals. These transactions in the aggregate brought in a very substantial sum of money.

At the trial the defendants claimed that they had legal authority to sell and dispose of the property, and that, if such legal authority was in fact lacking, they had nevertheless proceeded on an honest belief that the sales were lawful, and therefore that they were not guilty of the offenses charged in the indictment.

As to the lawfulness of the sales, the district judge ruled, as a matter of law, we think correctly, that neither the "Interim Permit," nor the subsequently executed lease, nor certain oral conversations which the defendant O'Malley claimed to have had at the Navy Department prior to the execution of the lease, conferred legal authority upon the lessee to sell any of the government-owned facilities. As to the defendants' claim that the items of property in question had been "abandoned" by the government as prior owner, and therefore might lawfully be disposed of by the defendants, the trial judge left this issue to the jury as a question of fact. As to the element of criminal intent, assuming that the sales were not legally authorized, the trial judge made it clear to the jury that it could not convict any one of the three defendants, either on the conspiracy count or on the count for the substantive offense, unless the jury were convinced beyond a reasonable doubt that such defendant acted with the belief that there was no lawful authority to sell the goods—"it is not a question of what a reasonable man would believe; the question is what did the defendants themselves believe?"

One of the errors asserted on appeal is that the trial judge should have granted the motions by defendants for a directed verdict of acquittal. Insofar as this point is predicated upon the alleged insufficiency of the prosecution's evidence to warrant a conviction, little need be said. The prosecution's evidence, including the furtive manner in

which the various transactions were conducted, constituted an impressive indication of guilt, particularly in the cases of defendants O'Malley and Joseph Moffie. Despite the somewhat half-hearted contention of appellants to the contrary, there was ample evidence to warrant submission of the case to the jury.

An alternative contention of appellants is that 18 U. S. C. § 641, upon which the substantive Counts 2, 3 and 4 were based, is an unconstitutional enactment. If this were so, it would follow that the court should have granted defendants' motions to dismiss the prosecution as to Counts 2, 3 and 4; and also the court should have granted the motion for acquittal on the conspiracy count, for the defendants could not be convicted under 18 U. S. C. § 371 for conspiracy to commit acts which for any reason did not constitute an offense against the United States.

18 U. S. C. § 641 provides that whoever steals or knowingly converts to his own use or the use of another, or without authority sells or otherwise disposes of, anything of value belonging to the United States shall be fined not more than $10,000 or imprisoned not more than ten years, or both; "but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." The section then defines the word "value" as meaning "face, par, or market value, or cost price, either wholesale or retail, *whichever is greater.*" [Italics added.] It is pointed out by appellants that in Count 2, for example, the cost to the government of the manual chain hoist was alleged to have been in excess of $100.00, though, according to the evidence, it was sold by defendant O'Malley for the sum of $45.00, which may perhaps have been its fair market value at the time of such sale. Appellants urge that to make the

doing of an act punishable in the greater degree of larceny, depending upon the original cost of the article stolen rather than upon its value at the time, is repugnant to Amendment VIII of the Federal Constitution, which prohibits the imposition of "excessive fines" or of "cruel and unusual punishments," because the severity of the penalty is greatly disproportionate to the offense charged.

We regard this constitutional argument as far-fetched and frivolous. The Congress, in defining the crime of larceny of government property, is not obliged to perpetuate the details of the ancient common law distinction between grand and petit larceny. The prescription in § 641 of maximum limits to the amount of fine or imprisonment which the judge may at his discretion impose, depending upon the circumstances of the offense, is characteristic of most of the offenses defined in Title 18 of the U. S. Code, and certainly does not constitute cruel and unusual punishment. Section 641 would have been within the constitutional power of Congress even if it had not provided for a lower maximum penalty of fine or imprisonment in case the "value" of the property, as defined, does not exceed the sum of $100.00.

Appellants claim that the trial judge committed error in permitting counsel for the government in his argument to the jury to make certain grossly improper and prejudicial remarks. The instances referred to were not objected to at the time of their occurrence, nor was the judge requested to instruct the jury to disregard the remarks. Under these circumstances it is only in an extreme and unusual case that an appellate court would be justified in reversing a judgment of conviction on the ground asserted, and this is certainly not such a case. See *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 238-40 (1940). We

have examined the argument of the Assistant U. S. Attorney in its entirety and have found it to have been moderate in tone and within the limits of permissible advocacy. Possibly some of the inferences which the prosecutor urged should be drawn from the evidence were open to logical challenge—as indeed might also be said of the arguments of defense counsel—but the jury is there to sift and weigh opposing evidence and arguments and to draw the appropriate inferences accordingly.

Also, certain alleged errors in the charge are offered as ground for reversal. When the judge completed his charge, counsel for O'Malley remarked: "It was an excellent charge." Counsel went on to say that defendants' requests Nos. 12, 18 and 27 had been fully covered in what the judge said with reference to the conspiracy count, but asked that these three requests be given also with reference to the substantive count. The judge expressed the view that he had already covered it—as we think, upon reading the charge, that he had. Counsel for the Moffies then objected only to the failure of the judge to give defendants' request No. 20, reading: "The mere fact that any of the defendants sold property of the Navy is not enough to warrant a conviction; the defendants must have conspired to sell property of the United States with criminal intent, knowing it to be unlawful. If they believed that they had the right to dispose of these articles, they must be acquitted." This request in substance, though not in the exact language, was fully given in the charge. The failure to give request No. 20 is not now urged as a ground for reversal.

After the jury reported verdicts of guilty, counsel for defendants indulged themselves in the not unusual practice of making a microscopic examination of the judge's charge in the hope of finding some error on which to base a claim

of appeal. Whether or not we would be obliged, under Criminal Rules 30, 51 and 52, to consider such alleged errors, we have in fact carefully examined the charge, and find that it was comprehensive, accurate, and fully protective of the rights of the defendants.

Other points urged by appellants have been considered and rejected, but call for no special comment.

The judgments of the District Court are affirmed.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 586

LOUIS J. O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH MOFFIE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1311-1318; Pet. 1a-9a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1955 (R. 1319). The peti-

tion for a writ of certiorari was filed on December 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether remarks by government counsel in his argument to the jury, which were not objected to at the trial, constituted reversible error.

STATEMENT

Petitioners were convicted in the United States District Court for the District of Massachusetts on the first count of a four count indictment (R. 1258-1263) of conspiracy to commit an offense against the United States in violation of 18 U.S.C. 371. In addition, each of the three petitioners was convicted of an independently charged substantive offense, *viz.*, selling property belonging to the Department of the Navy, in violation of 18 U.S.C. 641. Petitioner O'Malley was sentenced to a year and a day on each count, the sentences to run concurrently. Petitioner Joseph Moffie was sentenced to four months and Millard Moffie to three months on each count to run concurrently (Pet. 2a-3a). On appeal, the convictions were unanimously affirmed (R. 1319).

The pertinent evidence adduced at the trial may be summarized as follows:

On February 1, 1950, the Hingham Management Corporation took possession of the Naval Industrial Reserve Shipyard at Hingham, Massachusetts, under the authority of an interim permit (R. 1224-1227), pending the subsequent execution of

a formal lease (R. 1228-1257). Petitioner O'Malley, the corporation's president and principal officer, negotiated for the lease (R. 889-891, 977-999). Petitioner Joseph Moffie was O'Malley's principal assistant with the title of traffic manager (R. 561); petitioner Millard Moffie was a straw boss in the yard (R. 844).

The lease recited, *inter alia*, "* * * that the Facilities are not surplus to the needs of the Department * * * but are not, for the time being, required for public use" (R. 1228). Under its terms, the Hingham Management Corporation was to expend up to $100,000 a year on maintenance if necessary (R. 1238-1239). The lessee was required "* * * to protect the Government-owned real and personal property from damage by reason of the Lessee's operations" (R. 1236). Further, the lease provided that the Navy could terminate the lease and resume occupancy immediately in the event of a national emergency (R. 1246).

There is no clause in the lease transferring the title of any property to the lessee or giving it the right to sell. Clause eleven of the interim permit specifically states (R. 1226):

> The Permittee does not hereunder acquire any estate or permanent interest in the property of the Permittor.

During the period from 1950 to 1952, petitioners stripped the shipyard of a great variety of items that netted them a substantial sum of money, including office fixtures (R. 164-182, 454, 490), elec-

trical submarine cable (R. 261, 274), and heavy electrical conduits in good condition (R. 590, 729) which were used to supply power for shipbuilding operations (R. 714-721). Petitioner O'Malley sold the chain hoist referred to in Count 2 of the indictment (R. 468-471). In October, 1951, Joseph Moffie sold furniture and three metal steam kettles, including the kettle referred to in Count 3 of the indictment (R. 454-459). Millard Moffie supervised the pulling out (R. 431) of approximately 50 tons of cable from the ships piers (R. 522) as alleged in Count 4 of the indictment. Petitioners O'Malley and Joseph Moffie sold this cable as scrap (R. 302-305, 515-516) for over $15,000 (R. 522).

In February 1950, the Navy had instructed O'Malley and Joseph Moffie that the submarine cable (R. 676-677) and furniture (R. 664) were to be left on the property. Further instructions were given the Hingham Management Corporation, by a letter dated April 12, 1950, "* * * that no Government-owned property * * * is to be removed from the site for any reason * * *" (R. 700-701). Some of the cable was cut up after dark (R. 210, 332, 554, 586-587). When Joseph Moffie was told by a naval inspector that "If any of this Government property has been taken there's going to be hell to pay for it," Moffie said, "We'll make monkeys out of you" (R. 752). There was testimony by a purchaser of furniture (R. 490) that O'Malley told him that as far as O'Malley was concerned he had bought the furniture, but to tell any Navy investigator that the articles were merely leased

for the duration of the tenancy (R. 492-493). Petitioner O'Malley was a lawyer (R. 976, 1214).

In his final argument, petitioner O'Malley's counsel, Mr. Brogna, made the following observation (R. 1149-1150):

> I wish to call your attention to the two witnesses who were here yesterday. They were short, gentlemen, but, I hope, impressive. I am referring to Mr. Samuel Sears, former head of the Massachusetts Bar Association, former head of the Norfolk County Bar Association, and a very famous and able lawyer. He came in and testified as to O'Malley's reputation and standing—excuse me—as to his reputation for truth and veracity and his standing at the bar, among the legal profession, and he testified it was very good.
>
> Again, Mr. Garrity, who was the other witness, the other character witness, who was himself a former United States Attorney and a former Assistant United States Attorney. He testified the same way.
>
> Gentlemen, I submit that their testimony is entitled to a great deal of weight.

Subsequently, petitioners Moffies' counsel, Mr. Cohen, addressed the jury as follows (R. 1152-1153):

> * * * I want you to remember that, in 1949 and those years around 1949, items that were top secret during World War II were com-

monly offered for sale in the War Surplus Stores * * *.

* * * 13 years [has] passed since the event of Pearl Harbor. * * * Everything was marked as belonging to the United States Government, and yet it was offered for sale wherever you turned, at a fraction of its cost to the government. * * *

So this item of a Navy tag on an old desk or chair, or on a new one, for that matter, five years ago did not have the significance that it has today.

Government counsel near the start of his closing argument made the following statement (R. 1168):

I would like to say as a preliminary matter that if you think we get any fun or kick out of prosecuting a criminal case you are wrong. There is a great principle in the law, and that is equality before the law; and in dealing with this case in the jury room I am going to ask that you not be impressed by the big business aspects of it and the fact a figure of a hundred thousand dollars is mentioned, or the figure of $15,000 or $20,000. *I am going to ask that you consider the defendants in the same light you would consider, let us say, a 20-year old dope addict or a thief or something of that sort—men who don't have*

Sam Sears or George Garrity to come in speaking for them. [Emphasis added.]

He then proceeded to review the evidence. In closing he said (R. 1197-1198):

> Gentlemen, the last thing I am going to say to you, and I am almost finished, is the general significance of what took place down there. This involved a large sum of money. I think the total amount received from the sale of these articles came to approximately $45,000, somewhere in that vicinity. But, gentlemen of the jury, it isn't only the money and the value of this stuff that is significant. I want you to have in mind the time at which this occurred. The Korean War started in June of 1950, and these transactions went on both before and after that time. Nobody knew at that time whether we were going to be in a full scale war within a year or not. It was very possible. Many people thought it was probable. No one could know what the situation was at that time. And as Mr. Cohen asked you to take yourselves back to that time, I will ask you to take yourselves back to that time. If we had gone into a full scale war that yard would have been needed to make boats. The purpose of the lease was to keep the yard in a certain state of maintenance so it could be reactivated in a hurry. *These men who are charged here with getting*

> *together with a conspiracy to remove this property did a more effective job of sabotage on that yard than could have been done by any communist bomb or saboteur.* Why, if that yard had been needed, and the important thing in that yard was the piers and the ways—that's what the whole yard was for, was to build and construct and equip boats at those piers and ways. With all the heavy cable removed from those piers and ways it would all have to be replaced, and you can imagine the cost. But not so much the cost. If that yard had been needed in a hurry, in the condition it was when they went in there it would have been relatively easy to purchase the light electric lines and install those, plug them in; but it probably or might have, under the circumstances which it was possible could exist, would have taken months to supply that heavy electric cable, to have it made to specifications and installed. [Emphasis added.]

Petitioners' counsel made no objection at the trial to these statements.

ARGUMENT

1. Petitioners contend that the summation of government counsel, although not objected to at the trial, constituted reversible error (Pet. 4-14). Under the facts and circumstances of this case, that contention is without merit.

Although the first comment objected to (*supra*, pp. 6-7) might have been more temperately put,

it was invited by petitioner O'Malley's counsel. Counsel stressed the high standing of the two character witnesses that testified in O'Malley's behalf and urged that their testimony was "entitled to a great deal of weight" (*supra*, p. 5). The general tenor of the petitioners' defense was that they were men of such high moral standards and civic prominence that they could not possibly have committed the crime charged. Certainly the prosecution was justified in pointing out that petitioners were not entitled to any more consideration than anyone else charged with a crime merely because they were important or had important connections. A reading of the whole paragraph shows that that was the import of the allegedly prejudicial statement contained therein. Petitioners are in no position to complain of what was thus invited. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 241-242.

Similarly, petitioners' counsel also invited the "Communist saboteur" statement. It should be noted that the prosecution did not call the petitioners Communist or saboteurs, but merely likened their destruction of government property to sabotage.

Petitioners Moffies' counsel Cohen told the jury, in effect, that the items sold were not necessary to national defense, as in Pearl Harbor days, but were sold everyday as war "surplus" (*supra*, pp. 5-6). In rebuttal, the government pointed out that the items could have been vital in view of the Korean hostilities. The general import of the statement is

clearly supported by the evidence and merely puts into words what the very fact of prosecution implied, *i.e.*, the destruction of government property. See *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C.A. 2), certiorari denied, 329 U.S. 742, rehearing denied, 329 U.S. 826. The lease stated that the facilities were *not surplus* to the needs of the government; petitioners were required to spend up to $100,000 a year on maintenance; the lessee was required to protect the government owned property from damage, and there was a provision for immediate occupancy in the event of a national emergency (*supra*, p. 3). It is evident that the purpose of the lease was to have the shipyard maintained for immediate reactivation (R. 676-677, 744)—an object incapable of attainment if petitioners could, with impunity, sell fixtures necessary to the operation of the shipyard as "war surplus".

Petitioners evidently did not consider as prejudicial at the trial the statements now alleged to constitute reversible error. No objection was made to them at that time, although other unrelated objections were made during the course of the government's summation (R. 1194, 1196). As a rule, counsel cannot remain silent, interpose no objections, and, after a verdict has been returned, seize for the first time on the point that the comments to the jury were improper and prejudicial. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 238-239; *Heald* v. *United States*, 175 F. 2d 878, 883 (C.A. 10), certiorari denied, 338 U.S. 859;

Langley v. *United States,* 8 F. 2d 815, 819 (C.A. 6), certiorari denied, 269 U.S. 588. Particularly is this so where the government, as here, presents a "strong" case. See *Kotteakos* v. *United States,* 328 U.S. 750, 763; *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 238-240; *Fitter* v. *United States,* 258 Fed. 567 (C.A. 2). See also *Glasser* v. *United States,* 315 U.S. 60, 80.[1]

By the admission of petitioners' own counsel prior to the government summation, petitioners received a full and fair trial (R. 1130, 1167). This Court stated in *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 240:

> * * * where * * * the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evi-

---

[1] *Berger* v. *United States,* 295 U.S. 78, cited by petitioner (Pet. 12), is not in point because there was pervasive and continuous misconduct by the prosecutor without substantial hindrance from the trial court in a case where the prosecution's evidence was not strong (see 295 U.S. at p. 88).

Viereck v. *United States,* 318 U.S. 236 (Pet. 12-13), presents sharp contrasts to the instant case since here petitioner's counsel brought "war" into his argument *before* the government's summation, and the prosecution's remarks were based on the evidence and provoked by the petitioners. Further, in the *Viereck* case the reversal did not rest upon the prejudicial remarks of the prosecuting attorney.

Pietch v. *United States,* 110 F. 2d 817, 821-822 (C.A. 10), certiorari denied, 310 U.S. 648, relied upon the petitioners (Pet. 12), actually defeats their argument. The court refused to reverse, noting the failure to interpose a timely objection and its inability, on the basis of the record before it, to judge whether there was provocation.

dence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice.

For the reasons stated above, there is no merit in the alternative facet of petitioners' argument, the contention that the judge should have stopped the purportedly inflammatory remarks *sua sponte* and instructed the jury to disregard them (Pet. 2). The judge could reasonably conclude that the statements did not prejudice petitioners' rights, particularly in view of the fact that no objection was made. Whether or not an argument is prejudicial is a matter generally left to the discretion of the trial court. *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F. 338, 367 (C.A. 9), certiorari denied, 343 U.S. 935.

At the end of his charge, the trial judge asked if there was anything he had omitted. Petitioners requested additional charges but made no mention of the government's summation. Indeed, petitioners' counsel commented, "It was an excellent charge" (R. 1221).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,

ALBERT M. CHRISTOPHER,
Attorneys.

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